Supreme Court, U.S.
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No. 95-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HERBERT LITTLES,

Petitioner,

v.

JEFFERSON SMURFIT CORPORATION (U.S.),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

ELAINE R. JONES
Director-Counsel

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

REO KIRKLAND, JR.
P.O. Box 646
307 Evergreen Avenue
Brewton, AL 36427
(334) 867-5722

*JAMES U. BLACKSHER
LESLIE M. PROLL
710 Title Building
300 North 21st Street
Birmingham, AL 35203
(205) 322-1100

**Counsel of Record*

GREGORY B. STEIN
STEIN & BREWSTER
P. O. Box 1051
Mobile, AL 36633
(334) 433-2002

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

1.

Although Respondent advances a flurry of *factual* arguments, it expressly acknowledges that the decisions of the courts below actually rested on a *legal* determination: a "holding that claims of 'perpetuation of past discrimination' are not actionable under 42 U.S.C. §§ 1981 and 1982" (Br. Op. 13). As it admits, "the district court . . . h[eld] that [Petitioner's] allegation of [Respondent's] 'knowing perpetuation of past discrimination' *failed to state a claim* under §§ 1981 or 1982" (*id.* at 24) (emphasis supplied). Whether this holding was correct is precisely the issue which Petitioner asks this Court to decide; Respondent's formulation of the issue decided below is essentially the same as the first Question Presented in the Petition (Pet. i).

The Petition sets forth half a dozen decisions of this Court holding, under various circumstances, that perpetuation of past intentional discrimination violates the Fourteenth or Fifteenth Amendments (Pet. 19-21). Respondent does not dispute our characterization of these decisions, nor deny that the allegations in the instant case would state a claim if the paper mill in question had been operated by the State of Alabama rather than by a private corporation. Instead, Respondent defends the lower court rulings on the same mistaken legal premise relied on by the courts below, arguing that the legal standard under §§ 1981 and 1982 is different from the constitutional standard embodied in the Fourteenth and Fifteenth Amendments:

> The analyses applicable to suits alleging . . . invidious, unconstitutional, state-sponsored violations of civil rights are *completely different*

> from those applicable to suits alleging violations of §§ 1981 and 1982 by private businesses.

(Br. Op. 27) (emphasis supplied.) *See also id.* at 14 ("Constitutional standards are not applicable to this case under 42 U.S.C. §§ 1981 and 1982"). This was the very position adopted by the trial court (*see* Pet. App. 26a).

But that holding and argument are flatly inconsistent with this Court's teaching in *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389-91 (1982):

> [T]he origins of [section 1981] can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment . . . . The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself. . . . Although congress might have charted a different course in enacting the predecessors of § 1981 than it did in proposing the Fourteenth Amendment, we have found no convincing evidence that it did so.[1]

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[1] *Accord, e.g., Demery v. City of Youngstown*, 818 F.2d 1257, 1260 (6th Cir. 1987); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 (3d Cir. 1985), *aff'd*, 482 U.S. 656 (1987).

2.

Respondent asserts (Br. Opp. 18) that

> the factual linchpin upon which all of Littles' arguments in his Petition depends simply does not exist. Since Littles never proffered any evidence whatsoever that JSC had a past policy of discrimination with respect to its supplier contracts, Littles' arguments . . . raise issues that are not presented by the facts of this case, in addition to being legally unfounded.

This contention is both misleading and incorrect.

In the first place, it overlooks the fact that five months before the trial took place, the district court had held that Petitioner's "knowing perpetuation" contentions failed to state a claim and that Petitioner could not present them at trial. In denying Petitioner's motion for partial summary judgment,[2] the court held that it

> need not even determine whether there are any material disputed factual issues with respect to plaintiff's motion for partial summary judgment since the legal claims are not relevant in the instant action. As discussed above, if he is to prevail in this case plaintiff must prove that the defendant intentionally discriminated against him. *Plaintiff cannot prove intentional discrimination by either theory of proof proposed in his motion for*

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[2]Petitioner moved for partial summary judgment on the "knowing perpetuation" claims, "(1) that [Respondent]'s current practices perpetuate past and present intentional segregation of [Respondent]'s business environment and (2) that [Respondent]'s criteria for awarding dealerships 'lock in' the effects of [Respondent]'s historical discrimination" (Pet. App. 24a-25a).

> *partial summary judgment.* If these theories tend to prove anything, they prove discriminatory impact, which is not actionable under either § 1981 or § 1982.

(*Id.* at 25a) (emphasis supplied.) Then, at Respondent's behest, the court ruled that evidence tending to show "historical" discrimination by Respondent in awarding dealer contracts could not be introduced even on the narrower issue whether Respondent's most recent decision not to extend a dealership contract to Littles was "intentionally discriminatory." In granting, in part, Respondent's motion *in limine*, the court interpreted *Bazemore* to stand for the proposition that "evidence of pre-Act discrimination was relevant to show that it continued, not to show that the continuation of the discrimination was intentional" (Pet. App. 31a; *see id.* at 32a-33a).

Under these circumstances, it is frivolous for Respondent to complain about the quantum of evidence of its historic discriminatory dealer contract practices introduced or proffered at trial; as the district court remarked during the hearing (addressing Respondent's counsel), "you very artfully or forcefully caused me in your argument, and I think correctly, to close [the door] on [evidence of perpetuation]" (Tr. 283).[3]

Second, it is untrue that Petitioner "never *proffered* any evidence whatsoever that [Respondent] had a past policy of discrimination with respect to its supplier

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[3]Indeed, when Petititioner again sought to argue the "knowing perpetuation" claims in his post-trial motion for equitable relief, Respondent suggested that sanctions should be awarded against Petitioner. *See* Pet. App. 44a-45a.

contracts" (emphasis supplied). It is correct that, faced with the district court's rulings on his motion for partial summary judgment and the Respondent's motion *in limine*, Petitioner did not attempt a comprehensive evidentiary presentation of the "knowing perpetuation" claims. But Petitioner did in fact make a proffer of evidence that is probative of historical discrimination in the timber industry in Alabama, of which Respondent is a part (Pet. App. 39a-41a). The trial court, as requested by Respondent, refused to consider that evidence.

Finally, Respondent's attack on the factual sufficiency of Petitioner's "knowing perpetuation" claims is simply premature. As explained above, the question presented by the rulings in this case is whether the courts below erred in holding as a matter of law that Petitioner's "knowing perpetuation" allegations "failed to state a claim under §§ 1981 or 1982" (Br. Opp. 24). In determining that legal issue, well-pleaded factual allegations are assumed to be true, *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (same); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (same). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims," *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

3.

Preclusion of Petitioner's opportunity to present evidence that, in the past, Respondent itself participated in an industry-wide practice of restricting dealerships to whites limited Petitioner's ability to respond to the company's factual defense even on the narrow question of its current motives for refusing to give Petitioner a dealer contract. Although Petitioner performs all the functions

of a wood dealer, procuring 100% of his wood directly from landowners, cruising the timber, negotiating its sale to various markets, building roads as necessary, hiring crews to cut the wood, paying their insurance and workmen's compensation, etc. (Tr. 121-23, 147-49, 456-60), Respondent argued to the jury, as it does in this Court, that Petitioner's business is not as large as that of most dealers with paper mill contracts (Br. Opp. 5, 7). But Petitioner cannot expand his business without access equal to that of other dealers to the pulpwood market within 30 to 50 miles of his Brewton area timber base, as Respondent concedes (*id.* at 10). Yet as Respondent tells this Court, "during the several years prior to trial," it has not even considered increasing the number of its Brewton area dealers (*id.* at 12). The question before this Court is whether the lower courts committed legal error by refusing to allow Petitioner to prove that this all-white dealer monopoly is directly traceable to Respondent's own racially discriminatory practices prior to 1979.

4.

As we set out in the margin, even the erroneously constricted evidentiary record made below does not support the factual assertions set out in the Brief in Opposition.[4] At this point in the proceedings, however,

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[4]For example, Respondent suggests that few, if any, of its currrent dealerships are held by the children of its pre-1979 dealers. But Respondent's Procurement Manager tesified that one "common way [new dealers] obtain [a dealership] is through inheritance . . . . Many times a son will come into an operation that his father had previously been operating a dealership and his son will take over the business" (Tr. 548). Respondent cites three examples to suggest that individuals now routinely become dealers by buying existing dealerships (Br. Opp. 8). But two of the cited instances are acquisitions that occurred in the 1960's (Tr. 674, 720-21), when

factual arguments are premature. Petitioner is not seeking a ruling from this Court that the evidence he presented was sufficient to establish a "knowing perpetuation" claim actionable under 42 U.S.C. §§ 1981

(Petitioner alleges) Respondent refused to permit blacks to become dealers in any fashion, and the third example is in fact that of a firm inherited by the son of one of the original 1941 co-owners of the dealership in question (Tr. 849).

Respondent also asserts that subsequent to 1987 it "made thirteen new roundwood *supplier contracts*" (Br. Opp. 8, 13, 19) (emphasis supplied). Respondent's Procurement Manager explained at the trial that these thirteen *contracts* were "different" from the dealerships at issue in the litigation (Tr. 585). Some were "one time shot" contracts to buy a single lot of wood from a firm located far from Brewton (Tr. 489 (Carter Pulpwood; "no ongoing relationship"), 493 (Southern Timber; "a one tract deal"), 493-94 (Wire Grass Pulpwood; after one transaction, "we ceased doing business")). In a number of instances the firms receiving these contracts were dealers for other paper mills operated by Respondent outside of Brewton (Tr. 497 (firms that "regularly do business" with Respondent's Georgia mills)). Several of the one-time contracts were simply arrangements to swap wood with other major paper mills (Tr. 412-13 ("a number of those were wood swaps"), 494). At least one of the contracts was to buy wood that was owned by International Paper but which had mistakenly been delivered by a railroad to Respondent's Brewton mill (Tr. 418-19, 495-96). *None* of the firms with which Respondent made these thirteen contracts were minority-owned.

Finally, Respondent asserts that the Brewton mill "contracted directly with black-owned businesses for the purchase of *wood products*" (Br. Opp. 13 (emphasis supplied); *see also id.* at 18, 20, 23). However, Respondent conceded that it had never contracted directly with any black-owned firm to buy the roundwood which it uses to manufacture paper (Tr. 562). The transaction cited in the Brief in Opposition is a single instance prior to 1984 in which Respondent purchased "wood fuel," a reference to wood chips sold to the Brewton mill by a black-owned mill in Lowndes County (Tr. 562-63).

and 1982. Petitioner seeks only the opportunity to *present and try* such a claim to a jury empaneled in the United States District Court for the Southern District of Alabama. Nothing that Respondent says in the Brief in Opposition changes the fact that Petitioner was prevented from making that claim by the district court's legal ruling about the scope of §§ 1981 and 1982.

As we demonstrated in the Petition, that ruling is important; it is inconsistent with decisions of this Court and of other Courts of Appeals; it is erroneous; it affects a major industry in the southern United States; it will deny to many African-Americans the legal redress that Congress intended they should have to eliminate the legacy of past discrimination whose effects continue to this day; and it merits review by this Court.

Conclusion

For the foregoing reasons as well as those set forth in the Petition, a writ of certiorari should issue to review the judgment of the court below.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

REO KIRKLAND, JR.
P.O. Box 646
307 Evergreen Avenue
Brewton, AL 36427
(334) 867-5722

*JAMES U. BLACKSHER
LESLIE M. PROLL
710 Title Building
300 North 21st Street
Birmingham, AL 35203
(205) 322-1100

**Counsel of Record*

GREGORY B. STEIN
STEIN & BREWSTER
P. O. Box 1051
Mobile, AL 36633
(334) 433-2002

ERIC SCHNAPPER
UNIVERSITY OF
WASHINGTON SCHOOL
OF LAW
1100 N.E. Campus Way
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner